

**Pembinaan Eastern Aluminium Sdn Bhd v Narita Shipping &
Transport Sdn Bhd**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02-1817
OF 2011
MOHAMAD ARIFF, TENGKU MAIMUN AND VARGHESE GEORGE
JJCA
2 APRIL 2014

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*Contract — Lease — Non-registration — Whether unregistered lease good as
agreement for lease — Whether agreement for lease valid and enforceable
— Whether lessee estopped from denying existence and validity of lease agreement*

D

*Land Law — Lease — Non-registration — Whether unregistered lease good as
agreement for lease — Whether agreement for lease valid and enforceable
— Whether lessee estopped from denying existence and validity of lease agreement*

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*Landlord and Tenant — Lease — Non-registration — Whether unregistered
lease good as agreement for lease — Whether agreement for lease valid and
enforceable — Whether lessee estopped from denying existence and validity of lease
agreement*

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Pursuant to a lease agreement dated 18 May 2007 ('the agreement'), the plaintiff/respondent took a lease of an office and warehouse building ('the building') from the defendant/appellant. The building had been erected by the defendant at the plaintiff's request and in accordance to the plaintiff's specification. Clause 2.1 of the agreement provided that the issue document of title to the said land ('the IDT') had yet to be issued. Clause 2.2 provided that after the issuance of the IDT and the registration of the defendant's name thereon, the defendant shall apply to the relevant authorities for approval for the registration of the lease on the IDT. Clause 2.5 provided that in the event the defendant was unable to obtain the approval upon acceptable terms and conditions, the parties shall continue with the lease in accordance with the agreement until its expiry, save and except for the registration of the lease on the IDT. Vacant possession was delivered to the plaintiff. The plaintiff paid the defendant a total of RM369,000, being the deposit and first rental under the agreement. However, subsequently the plaintiff purported to terminate the lease and filed an action seeking for refund of the RM369,000. The plaintiff contended that the agreement was void on the grounds that the scheme of the National Land Code ('the NLC') is such that there cannot be a lease without title to the land. The plaintiff claimed that the agreement was thus void for

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- A** illegality pursuant to s 24 of the Contracts Act 1950 as the consideration of the agreement ie the lease itself was not permissible within the legal framework of the NLC, rendering the consideration unlawful. It was further submitted that the agreement was devised to evade the NLC and thus was void. The defendant claimed that the plaintiff was estopped from alleging that the agreement was void. The High Court allowed the plaintiff's claim and hence this appeal by the defendant.

Held, allowing the appeal with costs of RM30,000:

- C** (1) Although a lease is void for non-registration under the NLC and that an agreement might be a nullity as a lease, an agreement could be a good and valid enforceable agreement to grant a lease (see para) 15.
- D** (2) The agreement and the circumstances showed the clear intention of the plaintiff and the defendant to have an agreement to grant a lease. The plaintiff knew from the outset that the IDT had not been issued. But the issuance of the IDT to the defendant was contemplated. Further, regardless of the outcome of the application for the registration of the lease, the plaintiff and the defendant had agreed that they shall continue with the agreement to lease as borne out by cl 2.5 (see paras 17–18).
- E** (3) The termination of the agreement by the plaintiff was on the sole ground that the plaintiff was not able to carry on due to its financial difficulty. The agreement was not terminated because it was void or illegal (see para 20).
- F** (4) The agreement was a valid and enforceable agreement for a lease. As the demised premises was constructed based on the plaintiff's request and specifications and the plaintiff had taken vacant possession of the same, coupled with the fact that the termination was on the sole ground of the plaintiff's financial difficulty, the plaintiff was estopped from asserting that the agreement was void. As such, the plaintiff ought not to have the refund of RM369,000 and the defendant should be compensated for the loss under the agreement (see para 22).
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[Bahasa Malaysia summary]

- H** Menurut perjanjian pajakan bertarikh 18 Mei 2007 ('perjanjian tersebut'), plaintiff/responden mengambil pajakan untuk bangunan pejabat dan gudang ('bangunan tersebut') daripada defendan/perayu. Bangunan tersebut telah didirikan oleh defendan atas permintaan plaintiff-plaintif dan menurut spesifikasi plaintiff. Fasal 2.1 perjanjian memperuntukkan bahawa keluaran surat ikatan hak milik kepada tanah tersebut ('KSH') masih belum dikeluarkan. Fasal 2.2 memperuntukkan bahawa selepas keluaran KSH itu dan pendaftaran nama defendan ke atasnya, defendan hendaklah memohon kepada pihak berkuasa berkaitan untuk kelulusan pendaftaran pajakan itu atas KSH tersebut. Fasal 2.5 memperuntukkan bahawa sekiranya defendan tidak
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dapat memperoleh kelulusan itu atas terma dan syarat yang boleh diterima, pihak-pihak hendaklah meneruskan dengan pajakan itu menurut perjanjian itu sehingga ia luput, kecuali dan melainkan untuk pendaftaran pajakan atas KSH itu. Milikan kosong telah diserahkan kepada plaintif. Plaintif telah membayar defendan sejumlah RM369,000, sebagai deposit dan sewaan pertama di bawah perjanjian. Walau bagaimanapun, berikutan itu plaintif dikatakan menamatkan pajakan dan memfailkan tindakan memohon bayaran balik RM369,000. Plaintif berhujah bahawa perjanjian itu terbatal atas alasan bahawa skim Kanun Tanah Negara ('KTN') adalah seperti itu di mana tidak boleh ada pajakan tanpa hak milik kepada tanah tersebut. Plaintif mendakwa bahawa perjanjian itu adalah terbatal kerana menyalahi undang-undang menurut s 24 Akta Kontrak 1950 kerana balasan perjanjian itu iaitu pajakan itu sendiri tidak boleh dibenarkan dalam rangka perundangan KTN, yang menyebabkan balasan itu tidak sah. Selanjutnya adalah diujahkan bahawa perjanjian itu dirancang untuk mengelak daripada KTN dan oleh itu adalah terbatal. Defendan mendakwa bahawa plaintif diestopkan daripada mengatakan bahawa perjanjian itu adalah terbatal. Mahkamah Tinggi membenarkan tuntutan plaintif dan justeru itu rayuan ini oleh defendan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000:

- (1) Walaupun pajakan terbatal kerana tidak didaftarkan di bawah KTN dan perjanjian mungkin terbatal sebagai pajakan, suatu perjanjian itu masih suatu perjanjian yang wujud dan sah boleh dikuatkuasakan untuk diberikan pajakan (lihat perenggan 15).
- (2) Perjanjian itu dan keadaan menunjukkan dengan jelas niat plaintif dan defendan memasuki perjanjian untuk memberikan pajakan. Plaintif mengetahui dari awal bahawa KSH belum dikeluarkan. Namun keluaran KSH kepada defendan telah dipertimbangkan. Selanjutnya, tanpa mengira keputusan permohonan untuk pendaftaran pajakan itu, plaintif dan defendan telah bersetuju bahawa mereka hendaklah meneruskan dengan perjanjian itu untuk memajak sebagaimana dinyatakan dalam fasal 2.5 (lihat perenggan 17–18).
- (3) Penamatan perjanjian oleh plaintif adalah atas satu alasan bahawa plaintif tidak mampu bertahan kerana masalah kewangan. Perjanjian itu tidak ditamatkan kerana ia terbatal atau menyalahi undang-undang (lihat perenggan 20).
- (4) Perjanjian itu adalah perjanjian untuk pajakan yang sah dan boleh dikuatkuasakan. Oleh kerana premis itu dibina berdasarkan permintaan dan spesifikasi plaintif dan plaintif telah mengambil milikan kosong yang sama, bersama dengan fakta bahawa penamatan adalah satu-satunya alasan berhubung masalah kewangan plaintif, plaintif diestopkan daripada menegaskan bahawa perjanjian itu adalah terbatal. Oleh itu, plaintif tidak patut membayar balik RM369,000 dan defendan patut

- A** diberi pampasan untuk kerugian di bawah perjanjian itu (lihat perenggan 22).]

Notes

- B** For a case on non-registration, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5468.
For cases on non-registration, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3690–3704.
For cases on non-registration, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1020–1022.

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Cases referred to

- Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248; [2006] 4 CLJ 981, HC (distd)
- D** *Margaret Chua v Ho Swee Kiew & Ors* [1961] 1 MLJ 173, CA (refd)
Ong Heng Hua Realty Sdn Bhd v Teoh Chai Siok [1977] 1 MLJ 124 (refd)
Siew Soon Wah v Yong Tong Hong [1973] 1 MLJ 133, PC (refd)
Wan Salimah bte Wan Jaafar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener) [1998] 5 MLJ 162, HC (folld)
- E** *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105, FC (refd)

Legislation referred to

Contracts Act 1950 ss 5, 24, 40, 66, 78(3), 221

- F** **Appeal from:** Civil Suit No 22–129 of 2008 (4) (High Court, Johor Bahru)

Pang Kong Seng (KS Pang & Co) for the appellant.
Yoong How Kiat (HK Yoong) for the respondent.

- G** **Tengku Maimun JCA (delivering judgment of the court):**

[1] This is the defendant's appeal against the decision of the High Court in allowing the plaintiff's claim and dismissing the defendant's counterclaim. For ease of reference, parties will be referred to as they were in the High Court.

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[2] The plaintiff's claim against the defendant was for the refund of monies paid under a lease agreement dated 18 May 2007 entered into between the defendant as the lessor and the plaintiff as the lessee. The subject of the lease was an office and warehouse building to be erected by the defendant on a piece of land known as PLO 19 (PTD 87634), Jalan Persiaran Teknologi, Taman Teknologi, Johor Bahru ('the demised premises').

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[3] The preamble to the lease agreement states that the practical completion of the demised premises was expected to be on or before the expiry of a period

of five months from the date of the agreement. Clause 1.1 of the lease agreement provides that the term of the lease was for a period of five years commencing from the date of delivery of vacant possession of the demised premises at a monthly rental of RM56,500.

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[4] Clause 2.1 states that the issue document of title to the said land has yet to be issued by the appropriate authorities. Clause 2.2 states that after the issuance of the issue document of title to the land by the appropriate authorities and the registration of the defendant's name thereon, the defendant shall as soon as possible, at its own cost and expense submit application to the relevant authorities for the approval/consent for the registration of the lease on the issue document of title. Clause 2.3 provides, inter alia, that in the event the approval is subject to terms and conditions which are unacceptable to the defendant, then it shall be deemed that the approval has not been given and the provisions in cl 2.5 shall become applicable. Under cl 2.5, parties agree that in the event the defendant is unable to obtain the approval with terms and conditions acceptable to the defendant, the defendant shall continue to lease to the plaintiff and the plaintiff shall continue to take the lease in accordance with the agreement until its expiry, save and except for the registration of the lease on the issue document of title.

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[5] The demised premises was built by the defendant at the plaintiff's request and in accordance to the specification of the plaintiff. The certificate of practical completion of the demised premises was issued on 15 October 2007 and vacant possession was delivered to the plaintiff vide the defendant's letter dated 16 October 2007. The plaintiff acknowledged receipt of the defendant's letter by affixing its company's chop. By virtue of the agreement, the term of lease would have commenced from 16 October 2007–15 November 2012. The plaintiff had paid the defendant a total of RM369,000.00. The sum comprised of the first rental in the sum of RM56,500; five months' deposit in the sum of RM282,500 and part of the rent for December 2007 in the sum of RM30,000.

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[6] The certificate of fitness for occupation of the demised premises was issued by the Majlis Perbandaran Kulai on 17 March 2008. On 1 June 2009 the document of title to the said land was issued.

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[7] However, by a letter dated 15 December 2007, Tan Suan Chen of the plaintiff wrote to the defendant as follows:

RE: TERMINATION OF THE LEASE AGREEMENT

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I, on behalf of Narita Shipping & Transport Sdn Bhd hereby to inform you that we would like to terminate the lease agreement (reference number:HSH/SEET/37006/07/cc) with effect on 1 January 2008 due to our financial problem.

A We hope that you can understand and sorry for any inconvenience.

B [8] The defendant responded vide a letter dated 16 January 2008 requesting for payment of the outstanding rental for the month of December 2007 (RM26,500) and January 2008 (RM56,500). The plaintiff failed to pay. To mitigate its losses, the defendant entered into a tenancy agreement with GPAC Technology (S) Pte Ltd. The term of the tenancy was for three years from 1 August 2008–31 July 2011 at the rate of RM50,000 a month.

C [9] On 22 February 2008, the plaintiff filed the writ and the statement of claim seeking for the refund of RM369,000 paid to the defendant. The basis for the claim is that the lease agreement is void. In its statement of defence, the defendant pleaded that the lease agreement is valid and enforceable and that the plaintiff is estopped from alleging that the lease agreement is void. The defendant counterclaimed for the rental for the whole term of the agreement less the sums paid by the plaintiff and the rental received by the defendant from GPAC Technology (S) Pte Ltd. After a full trial, the learned High Court judge allowed the plaintiff's claim and dismissed the defendant's counterclaim, hence this appeal.

E THE APPEAL

F [10] Due to the delay in the delivery of the grounds of judgment, directions were given during case management that the appeal be heard without the grounds of judgment of the learned trial judge. We did so accordingly.

G [11] Before us, the principal issue to be determined was on the validity of the lease agreement. It was the submission of learned counsel for the defendant that an agreement to grant or to create a lease is different from a lease and that an agreement to grant or to create a lease is valid even though the lease is void for non-registration under the National Land Code ('the NLC'). Other issues raised were on estoppel and restitution under s 66 of the Contracts Act 1950.

H [12] For the plaintiff, it was submitted that the scheme of the NLC is such that there cannot be a lease without title to the land. Various provisions of the NLC, ie s 5 on the definition of 'alienated land'; 'proprietor' and 'State land'; ss 40, s 78(3) and s 221 were cited in support thereof. Section 40 stipulates that the property in all state land and the powers of disposal are vested solely in the state authority. Section 78(3) provides that the alienation of state land shall take effect upon registration of the register document of title while s 221 deals with the power of proprietors of any alienated land to grant lease of the whole or any part of the land.

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[13] Flowing from the quoted provisions of the NLC, the bone of contention of the plaintiff was that the lease agreement is void for illegality by the definition of s 24 of the Contracts Act 1950 in that the consideration of the lease agreement ie the lease itself is not permissible within the legal framework of the NLC, rendering the consideration unlawful under the said section. It was further the submission of learned counsel for the plaintiff that by cll 2.3 and 2.5, the lease agreement was devised to evade the NLC and that the defendant who has received the payment under the lease agreement which is void, is bound to refund the same to the plaintiff.

OUR FINDINGS

[14] Having considered the oral and written submissions of both parties and having perused the record of appeal, we agree with learned counsel for the defendant that the lease agreement is valid and enforceable. We unanimously allowed the appeal and we set aside the order of the High Court. Judgment was entered against the plaintiff on the counterclaim for the sum of RM471,000 with interest at 8%pa from 1 January 2008 until full payment. We made a further order that the sum of RM369,000 together with interest paid by the defendant to the plaintiff be refunded to the defendant. Our reasons for so deciding are as follows.

[15] It has been established by a long line of authorities that although a lease is void for non-registration under the NLC and that an agreement might be a nullity as a lease, an agreement could be a good and valid enforceable agreement to grant a lease. On the above proposition, we were referred to the following cases by learned counsel for the defendant:

- (a) *Margaret Chua v Ho Swee Kiew & Ors* [1961] 1 MLJ 173;
- (b) *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105;
- (c) *Siew Soon Wah v Yong Tong Hong* [1973] 1 MLJ 133;
- (d) *Wan Salimah bte Wan Jaafar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener)* [1998] 5 MLJ 162;
- (e) *Ong Heng Hua Realty Sdn Bhd v Teoh Chai Siok* [1977] 1 MLJ 124; and
- (f) *Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248; [2006] 4 CLJ 981.

[16] In *Hotel Anika's* case, the dispute also centres on a lease agreement where the defendant had no title to the subject land when the agreement was entered into. It was held in *Hotel Anika* that it would not seem the reasonable construction, indeed wholly improbable, that the defendant could have agreed to grant a lease of land to which it has no title. The reasonable construction

A would be that both parties had entered into the said agreement on the assumed basis that title to the said land would be alienated to the defendant. And until then, the plaintiff was permitted to use the said land. Hence what was agreed was a lease that would be effective if the defendant had obtained the relevant title.

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[17] In the instant appeal, it is our view that the lease agreement and the circumstances show the clear intention of the plaintiff and the defendant to have an agreement to grant a lease. It is not in dispute that the construction of the demised premises was completed as per the request and specification of the plaintiff. The plaintiff took vacant possession of the demised premises on 16 October 2007. The plaintiff knew from the outset that the issue document of title to the said land has not been issued to the defendant. But the issuance of the title to the defendant was contemplated, hence cl 2.3 of the lease agreement on the defendant's obligation to obtain approval for the registration of the lease upon the issuance of the document of title.

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[18] Further, regardless of the outcome of the application for the registration of the lease, the plaintiff and the defendant have agreed that they shall continue with the agreement to lease as borne out by cl 2.5 of the agreement. The provisions of the NLC referred to by learned counsel for the plaintiff govern the registration and/or the validity of the lease but the intention of the parties was crystal clear. They have decided that they shall not bind themselves to the registration of the lease but choose instead to carry on notwithstanding the non-registration of the lease under the NLC. The plaintiff was well aware of the terms and conditions of the lease agreement. Indeed it was not the case of the plaintiff that it was being misled into executing the lease agreement with the defendant.

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[19] We share the view of Abdul Malik Ishak J (as His Lordship then was) in the case of *Wan Salimah bte Wan Jaafar*, as follows:

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it is correct to say that the written agreement (P1) though void at law as a lease because of non-registration as required under s 221(4) of the NLC, yet it is good as an agreement enforceable in equity. The parties intended that there should be a lease and equity must be invoked to carry that intention into effect effectively. It is germane to mention that there is s 206(3) of the NLC which enacts that nothing in sub-s (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein. The contractual obligation of the parties under the written agreement (P1) must be given effect.

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[20] We wish to emphasise that from the contemporaneous document, the termination of the lease agreement by the plaintiff was on the sole ground that the plaintiff was not able to carry on due to its financial difficulty. This was confirmed by the oral evidence of the plaintiff's witness, Tan Suen Chen in his examination-in-chief that when the plaintiff found it too heavy a burden to pay for the rent, by a letter dated 15 December 2005, he wrote to the defendant to inform the defendant of the plaintiff's intention to terminate the agreement with effect from 1 January 2008. Tan Suen Chen did not state that the lease agreement was terminated because it was void or illegal. Further, in notifying the defendant of its intention to terminate the agreement vide its letter dated 15 December 2007, the plaintiff did not ask for the refund of the monies paid to the defendant. In our view, the contemporaneous document is evidence of the plaintiff's real reason not to proceed with the lease agreement.

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[21] Learned counsel for the plaintiff had submitted that in making the payments to the defendant and in informing the defendant of its desire to terminate on the ground of its financial difficulty, the plaintiff had been acting under the wrong understanding that the lease agreement was valid. Put another way, the plaintiff was ignorant of the law. We noted however that this material fact was not pleaded by the plaintiff.

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[22] To conclude, we find that the agreement is a valid and enforceable agreement for a lease. And unlike the case of *Hotel Anika*, where the document of title was not issued and the court held that there was frustration of the agreement, in the instant case, the issue document of title was in fact issued on 1 June 2009. As the demised premises was constructed based on the plaintiff's request and specifications and the plaintiff had taken vacant possession of the same, coupled with the fact that the termination was on the sole ground of the plaintiff's financial difficulty, we agree with learned counsel for the defendant that the plaintiff is estopped from asserting that the agreement for the lease of the demised premises is void. As such, the plaintiff ought not to have the refund of RM369,000 and that the defendant should be compensated for the loss under the lease agreement. In view of our ruling that the lease agreement is valid, we do not see the need to deal with the issue of restitution under s 66 of the Contracts Act 1950.

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[23] In light of all the above, the defendant's appeal was allowed with costs of RM30,000 here and below, on terms as stated in the earlier part of this judgment. Deposit refunded.

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A *Appeal allowed with costs of RM30,000.*

Reported by Kanesh Sundrum

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